HJ. ABDILLAH BIN HJ. ABDUL HAMID

v.

DISTRICT OFFICER, SEMPORNA

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[ORIGINATING MOTION NO. T(25) 6 OF 1994]
28 APRIL 1995

PRACTICE & PROCEDURE: *Ex parte application for leave to apply for order of certiorari against demolition order of local authority - Reliance on assertions in applicant's affidavit - Leave granted - Affidavit containing false assertions - Effect on order for leave and substantive motion for certiorari.*

The applicant sought to challenge a demolition order of the District Officer, Semporna and accordingly filed an application for leave to apply for an order of *certiorari* supported by his affidavit which asserted, *inter alia*; that the eight houses ordered to be demolished were built by his late father before he was born on 14 October 1952 and the same was subsequently inherited by him. He further asserted that the inheritance consisted of a family house and six huts which he had renovated at a cost of about RM150,000 upon the respondent's request. The Court, relying upon these assertions, granted the applicant leave.

At the hearing of the substantive motion for *certiorari*, the respondent contended that the motion ought to be dismissed as the applicant had misled the Court that the houses were built prior to his birth. Oral and documentary evidence revealed that there was in fact only a single wooden hut on the property; used as a resting place for collectors of turtle eggs, until after 12 November 1993 when the applicant demolished it and built a house and seven chalets. The applicant failed to reply to the contention and evidence raised.

Held:
There had not been full disclosures by the applicant in his affidavit. In fact he made assertions which he knew could not be supported by the documents he produced but he nevertheless falsely asserted that those documents supported his assertions. On that ground the order granting leave to apply for an order of *certiorari* is set aside which means that the substantive motion must also fail. The order staying the demolition is also lifted.

[Order for leave to apply for certiorari set aside, order staying demolition lifted, costs to respondent].

Case referred to:
Dormeuil Freres SA v. Nicolian International (Textiles) Ltd. [1988] 3 All ER 197 ***(foll)***

For the applicant - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the respondent - Athmat bin Hassan; State Attorney-General Chambers, Sabah

JUDGMENT

Ian H.C. Chin J:

Hj. Abdillah bin Hj. Abdul Hamid ("the applicant"') is a native of Sabah. On 7 December 1994, he received a letter from the District Officer, Semporna ("the respondent") ordering him to demolish his eight houses and if it is not done, the respondent will do it at his costs. He was not heard before the decision to demolish was made and he is now

challenging the demolition order. As to how the eight houses came to be built this is what the applicant says in his affidavit, *viz.*:

> 6. The said houses were built by my late father, Hj. Abdul Hamid Bin Tilaran, well before I was born on 14 October 1952. The said houses were built on my father's hereditary land measuring approximately 2.5 acres in Sipadan Island. The said houses and land was inherited by me upon my father's death as evidenced by a Will made by my late father on 24 June 1993. Annexed hereto is a copy of the aforesaid Will marked as exhibit "B".
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> 7. The minutes of a meeting held at the District Office, Semporna on 15 November 1993 and attended by the relevant authorities confirmed my inheritance and ownership of the said houses and land. Annexed hereto is a copy of the said minutes, which was confirmed correct by the respondent, marked as exhibit "C".
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> 8. The said houses originally consisted of one family house and six huts.
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> 9. By letter dated 12 November 1993 the respondent requested me to renovate the said houses as the said houses were old and in bad condition. In reliance upon the respondent's letter dated 12 November 1993. 1 renovated the said houses at a cost of approximately RM150,000. Annexed hereto is a copy of the letter dated 12 November 1993 marked as exhibit "D".

It was upon those assertions of the applicant that I have just set out that I granted leave to apply for an order of *certiorari.* At the hearing of the motion, it was moved on behalf of the respondent that the motion ought to be dismissed because the applicant had misled the Court when the applicant asserted that the houses were built even before his birth on 14 October 1952.

Hussein bin Muin, the acting Senior Wildlife Officer of Semporna, under whose jurisdiction Sipadan Island comes under, deposed that there was only one small wooden hut and that it was after 12 November 1993 that the applicant demolished the hut and in its place built a house measuring 75 feet by 90 feet and built 7 other individual chalets as well. The present District Officer, Adnan Miassin, similarly deposed but he added that the hut was used by various people as a resting place while collecting turtle eggs. The applicant did not reply and I think he cannot because that was the truth and the truth is further supported by the minutes, a nine-page document, the applicant had produced and which I have only now gone into in detail.

The title of the minutes talks of the settlement or resolution of the problems relating to the hereditary right of collecting turtle eggs from Sipadan Island. Save for one paragraph which I will refer to shortly, the minutes talk only of the right to collect turtle eggs and the division of money which three dive operators of the island had agreed to pay in return for their agreeing not to collect the eggs. The paragraph that talks about the house and land is paragraph 5.6 and it says:

> **5.6 Ketetapan 6: Pewaris Tanah dan Rumah Dikari Pulau Sipadan**
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> Haji Abdillah bin Haji Abdul Hamid disyahkan oleh kedua-dua pihak khususnya Alukan bin Kaneh dan semua waris, sebagai Pewaris kepada sebuah rumah dan kebun kelapa di Pulau Sipadan.
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> Kebun kelapa di Pulau Sipadan adalah kepunyaan Tilaran bin Panglima Abu Sari dan Haji Abdul Hamid oleh kerana merekalah yang membangun tanah dan menanam kelapa di Pulau Sipadan. Apabila Tilaran meninggal dunia (26 Jun 1983), maka adalah disyahkan rumah dan kebun kelapa di Pulau Sipadan di warisi dan seterusnya di miliki oleh Hj. Abdillah bin Haji Abdul Hamid.

Oleh itu Haji Abdillah Berhak sebagai pemilik yang syah dan boleh membuat Tuntutan Waris mengikut peraturan dan Undang-Undang Mahkamah Ketua Anak Negeri Daerah Semporna.

From the minutes, just reproduced, it would appear that they were talking in the meeting on 15 November 1993, of only one house. That there was only one house at the relevant time can also be gathered from the following letter dated 12 November 1993, from the District Office to the applicant, *viz*.:

Per: Mengubah Suai Rumah Warisan Dikari Pulau Sipadan, Semporna.

Dengan hormatnya saya merujuk surat tuan bertarikh 5 October 1993 mengenai dengan perkara di atas.

2. Sebagaimana saya difahamkan bahawa bangunan yang telah didirikan oleh pihak tuan adalah merupakan sebagai 'rumah warisan' dan masa ini bangunan tersebut sudah agak lama/ buruk, maka ianya haruslah diperbaiki dan diubahsuai demi memenuhi kehendak semasa. Pengubahsuaian ini adalah difikirkan begitu perlu memandangkan perkembangan pembangunan pelancongan yang sedang rancak di pulau tersebut. Tentulah perubahan ini dengan sendirinya juga akan memberikan suatu daya tarikan kepada setiap pelancong yang berkunjung ke pulau tersebut.

3. Atas fakta-fakta diatas, maka saya tiada halangan atas daya usaha tuan untuk mengubahsuai bangunan tersebut, asalkan ianya tidak merosakkan tumbuh-tumbuhan dan perkembangan alam sekeliling di pulau tersebut.

The letter which I have just reproduced also speaks of only one house. Therefore, it is a deliberate lie for the applicant to have asserted, in paragraph 7 of his affidavit, that the minutes "confirmed my inheritance and ownership of the said houses". The minutes do nothing of that sort since it refers to only one house and in fact, the minutes say the applicant could make his claim in the Native Court. It is also a lie for the applicant to assert, in paragraph 9 of his affidavit, that the District Officer had requested him to renovate the "said houses" when the letter only speaks of one house. What was conveyed to me through the said affidavit assertions at the *ex parte* hearing was that all houses were built before 14 October 1952 and that the applicant's father had owned all of them whereas the truth, as set out earlier, is otherwise. What then is the legal position of an order being obtained, granting leave to apply for an order of *certiorari*, when the affidavit of the applicant contains lies? The law is stated in *Dormeuil Freres SA v. Nicolian International (Textiles) Ltd.* [1988] 3 ALL ER 197, at p. 199 that:

It is a basic principle, applicable to all *ex parte* applications, that a plaintiff seeking *ex parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the Court may discharge the *ex parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the Court *inter partes*, justice requires an order either continuing the *ex parte* injunction or the grant of a fresh injunction, such order can be made notwithstanding the earlier failure of the plaintiff to make full disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex parte* order obtained without due disclosure set aside; there is a discretion in the Court whether to do so or not.

Mr. Sugumar Balakrishnan, Counsel for the applicant, did not even bother to reply to the submission of Mr. Athmat bin Hassan, Counsel for the respondent, that the Court had been misled. There had not been full disclosures by the applicant in his affidavit. In fact, he had made assertions which he knew cannot be supported by the documents he produced but had nevertheless falsely asserted that those documents supported his

assertions. On that ground I would set aside the order granting leave to apply for an order of *certiorari* which means that the substantive motion must fail since there is no longer any leave being granted to apply for an order of *certiorari*. The order staying the demolition is also lifted. There will be costs to the respondent.